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THE COURT CONFRONTS THE GERRYMANDER

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THE UNITED States Supreme Court refused to squarely address political gerrymandering until 1986. In *Davis v. Bandemer*,[1] the Court held that political gerrymandering was justiciable and violative of the equal protection clause of the fourteenth amendment.[2] In this Comment the author discusses the nature of political gerrymandering, the Court's decision, its potential impact, and finally, the justifications for the Court's decision.[3]

I. THE NATURE OF GERRYMANDERING

Gerrymandering is a political device with a long history in American politics. The term originated in 1812, when the Democratic-Republican (Jeffersonian) controlled Massachusetts Legislature divided the County of Essex into two senatorial districts to dilute the strength of the Federalists. An artist depicted the map of the district as a creature that looked like a salamander. A newspaper editor labeled the creature a "gerrymander" in honor of the Governor, Elbridge Gerry.[4]

There is a tendency to equate gerrymandering with districts having bizarre, contorted shapes and sizes that "weave and wind" all over the map.[5] This is wrong because gerrymandering can exist in geographically compact and contiguous districts.[6] To begin any discussion of gerrymandering, one must first define the term. Commentators and the courts have struggled for a definition. The noted scholar Robert Dixon, Jr. wrote that "gerrymandering is discriminatory districting. It equally covers squiggles, multi-member districting, or simple non-action, when the result is racial or political malrepresentation."[7] This definition has been accepted by some members of the Court who define gerrymandering as "the deliber-

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1. 106 S. Ct. 2797 (1986).

2. U.S. CONST. amend. XIV, § 1.

3. This Comment will be concerned solely with the constitutionality of political gerrymandering. However, references will be made to racial gerrymandering for illustrative or comparative purposes.

4. Engstrom, *Post-Census Representational Districting: The Supreme Court, "One Person, One Vote," and The Gerrymandering Issue*, 7 S.U.L. REV. 173, 207 (1981).

5. BAKER, *Gerrymandering: Privileged Sanctuary or Next Judicial Target?*, in REAPPORTIONMENT IN THE 1970's 121, 122 (N. Polsby ed. 1971).

6. *Id.*

7. R. DIXON, DEMOCRATIC REPRESENTATION REAPPORTIONMENT IN LAW AND POLITICS 460 (1968).

ate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes."[8]

Gerrymandering has been in existence throughout our political history and is regarded as the inevitable byproduct of the American system of legislative elections by district.[9] Three conditions are required before gerrymandering can exist: 1) one party must have sufficient control over the legislative powers of a state (including the governor); 2) the minority party must be large enough to be a target; and 3) the majority must be cohesive so that it will deal with the gerrymandering process as a party rather than a collection of individuals.[10]

A. *Recent Trends*

While gerrymandering has been a part of American politics since at least 1705,[11] it is widely believed that the apportionment revolution of the 1960s exacerbated its effects. The apportionment revolution began with the United States Supreme Court's decision in *Baker v. Carr*,[12] holding that malapportionment was a justiciable issue. *Baker* was rapidly followed by *Wesberry v. Sanders*[13] and *Reynolds v. Sims*,[14] which signaled the Court's preoccupation with population equality for state and congressional districts. This emphasis on the "one man, one vote" standard of population equality has done nothing to limit or hinder gerrymandering, but has only encouraged it.[15]

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8. Karcher v. Daggett, 462 U.S. 725, 786 (1982) (Powell, J., dissenting) (quoting Kirkpatrick v. Preisler, 394 U.S. 526, 538 (1981) (Fortas, J., concurring)). *See also* BAKER, *supra* note 5, at 121.

9. MAYHEW, *Congressional Representation: Theory And Practice In Drawing The Districts*, in REAPPORTIONMENT IN THE 1970'S 249, 275 (N. Polsby ed. 1971).

10. R. DIXON, *supra* note 7, at 462.

11. Engstrom, *supra* note 4, at 207 n.153. Discriminatory districting was first identified in 1705, when the colonial legislature of Pennsylvania sought to minimize the political strength of Philadelphia. *Id.* (citing E. GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER 26-29, 120-21 (1907)).

12. 369 U.S. 186 (1964). For a discussion of the "reapportionment revolution," see R. DIXON, *supra* note 7, at 3.

13. 376 U.S. 1 (1964). The Court construed U.S. CONST. art. I, § 2 to require "as nearly as possible one man's vote in a congressional election to be worth as much as another's." *Id.* at 7-8.

14. 377 U.S. 533 (1964). The Court required a "substantial equality of the population among the various state legislative districts." *Id.* at 539.

15. Baker, *Judicial Determination of Political Gerrymandering: A "Totality of Circumstances" Approach*, 3 J.L. & POL. 1 (1986) [hereinafter *Totality of Circumstances Approach*]. "[I]f the experience following the 1970, 1980 censuses has demonstrated anything, it is that the most extreme form of gerrymandering can indeed flourish within the most

The apportionment revolution increased the possibility of political gerrymandering for several reasons. The Court's decisions required that the states reapportion every ten years, something many had failed to do previously, giving legislators more opportunities to gerrymander.[16] The widespread use of computer technology has enabled legislators to develop highly partisan plans despite the presence of absolute population equality.[17] The emphasis on population equality permits or may actually require that other traditional factors such as community, geographic, and political subdivision boundaries be ignored in the name of "one man, one vote," thereby eliminating potential constraints on line drawing.[18] The concern of increased partisan gerrymandering was noted by the dissenters in *Kirkpatrick v. Preisler*[19] and *Wells v. Rockefeller*.[20] Justice Harlan wrote, "the Court's exclusive concentration upon arithmetic blinds it to the realities of the political process . . . . The fact of the matter is that a rule of absolute equality is perfectly compatible with 'gerrymandering' of the worse sort."[21] *Kirkpatrick* and *Wells* were seen as giving legislators a green light to gerrymander without regard to former county lines or other political subdivisions.[22]

B. *Judicial Development of Political Gerrymandering Prior to* Davis v. Bandemer

The concerns of the minority in *Wells v. Rockefeller* were not met by any intervention by the Court into the gerrymandering issue until *Davis v. Bandemer*. During the period between the late 1960s and 1986, the Court avoided facing the issue of political gerrymandering directly, though it accepted review of cases involving racial gerrymandering.[23] The Court's reluctance to deal with the

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miniscule population variances. The absence of other constraints has permitted political cartographers virtually unchecked discretion in creating districts." *Id.* at 6.

16. Engstrom, *supra* note 4, at 208. For example, in 1964 Georgia had not reapportioned its congressional districts since 1930. *Wesberry*, 376 U.S. at 1, 2.

17. *Karcher*, 462 U.S. at 776 (1982) (White, J., dissenting); *see also* Engstrom, *supra* note 4, at 208.

18. *Karcher*, 462 U.S. at 784 (1982) (Powell, J., dissenting); *see also Totality of Circumstances Approach*, *supra* note 15, at 2.

19. 394 U.S. 526 (1969) (Harlan, J., dissenting).

20. *Id.* at 542.

21. *Id.* at 551.

22. BAKER, *supra* note 5, at 135.

23. Wright v. Rockefeller, 376 U.S. 52 (1964), was the first case to rule directly on claims of racial gerrymandering. *See also* R. DIXON, *supra* note 7, at 464-65.

issue could be attributed to the fear of entering that most partisan of all "political thickets."[24]

Prior to 1986, however, the Court was not completely silent about the gerrymandering issue. The first case to deal with gerrymandering was *Gomillion v. Lightfoot*.[25] *Gomillion* involved an attempt by the city of Tuskeegee to redefine its boundaries from a square into a twenty-eight sided figure for the purpose of removing all but four of its population's 400 blacks. The Court struck down the plan as violative of the fifteenth amendment. The Court's rationale was centered on the clearly racially motivated attempt to exclude blacks from participating in politics in Tuskeegee, and did not address the case in terms of gerrymandering.[26]

After *Gomillion*, the Court began to review claims of racial gerrymandering. In *Wright v. Rockefeller*,[27] the plaintiffs charged that the New York congressional delegation had been gerrymandered. In *Wright*, the Republican controlled legislature placed nonwhites and Puerto Ricans into one congressional district in Manhattan so that they constituted 86% of the district's population. At the same time, a district comprised of 95% whites was created for then Republican Congressman, John Lindsey. The Court rejected the racial gerrymandering charge, but only after affirming a "finding" by the district court that the districts were not established with an intent to segregate on the basis of race.[28] Thus the Court impliedly confronted the gerrymandering issue and adjudicated the claim on its merits.

In a series of cases involving racial gerrymandering decided after *Wright*, the Court noted that an apportionment plan would be struck down as unconstitutional if it "operate[d] to minimize or cancel out the voting strength of racial or *political* elements of the voting population."[29] This language indicated the Court's concern with the political gerrymandering issue, but this concern was not acted upon until *Davis v. Bandemer*.

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24. The term "political thicket" was coined by Justice Frankfurter in Colegrove v. Green, 328 U.S. 549, 556 (1946), where the Court dismissed a complaint brought against a grossly malapportioned Illinois Congressional district.

25. 364 U.S. 339 (1960).

26. *Id.* at 346.

27. 376 U.S. 52 (1964).

28. *Id.* at 58.

29. Forston v. Dorsey, 379 U.S. 433, 439 (1965) (emphasis added). *See also* Whitcomb v. Chavis, 403 U.S. 124, 143 (1971); Burns v. Richardson, 384 U.S. 73, 88 (1966).

In *Gaffney v. Cummings*,[30] the Court was first faced with a claim of political discrimination under the equal protection clause. The claim involved the reapportionment plan of the Connecticut Legislature which was prepared by a bipartisan apportionment board that attempted to draw the district lines to reflect a "rough scheme of proportional representation of the two major political parties."[31] The districts were constructed "so that the composition of both Houses would reflect 'as closely as possible . . . the actual [statewide] plurality of votes on the House or Senate lines in a given election.' "[32] Despite the bipartisan board, officials of the state Democratic party brought suit challenging the plan on both population equality and fourteenth amendment grounds. The Court held that the plan did not violate the fourteenth amendment because it attempted a rough proportional scheme.[33] The Court observed that the overt political motivation in the plan alone was insufficient to make the plan unconstitutional, particularly as the plan attempted to fairly allocate seats on the basis of population. The Court recognized that a plan drawn without any political consideration whatsoever could create "the most grossly gerrymandered results."[34] While not expressly addressing the issue of justiciability of gerrymandering claims, the Court noted that reapportionment and redistricting "is not wholly exempt from judicial review" and should be conducted within certain limits so as not to exclude racial or political groups from the political process.[35] *Gaffney*, however, did not contain a detailed analysis of the gerrymandering issue and certainly provided no standards. After *Gaffney*, it was still an open question whether political gerrymandering claims were justiciable, and if so, whether they would be held unconstitutional.

In 1983, a majority of the Court indicated that it was willing to address the political gerrymandering issue. The justices made their views known in *Karcher v. Daggett*.[36] *Karcher* involved the New Jersey reapportionment of congressional seats after the 1980 census. The districts drawn under the reapportionment plan (Feldman Plan) had an average deviation from the mean of 0.1384% or about

30. 412 U.S. 735 (1973).
31. *Id.* at 738.
32. *Id.*
33. *Id.* at 753.
34. *Id.*
35. *Id.* at 754.
36. 462 U.S. 725 (1983).

726 people.[37] Despite the infinitesimal population difference in the districts, the Court held the plan unconstitutional as violative of article I, section 2 of the United States Constitution.

The Court's holding rested in part on the fact that the plan was not the product of a good faith effort to achieve population equality. The dispositive factor in the analysis was the existence of other plans introduced in the state legislature which had smaller deviations. According to the Court, the failure to adopt the alternative plans evidenced a failure to make a good faith effort to achieve population equality.[38] The Court also noted that a state's interest in legitimate objectives such as compact districts, respecting municipal boundaries, preserving old districts, and avoiding contests between incumbents could justify some deviation in population.[39] New Jersey, however, could not justify the plan on any of the above grounds.[40]

The political gerrymandering issue was scrutinized in the separate opinions. Justice Stevens faced the gerrymandering issue squarely and wrote "political gerrymandering is one species of 'vote dilution' that is proscribed by the Equal Protection Clause."[41] Justice Powell, who could not have been more eager to address the political gerrymandering issue, stated, "I therefore am prepared to entertain constitutional challenges to partisan gerrymandering that reaches the level of discrimination described by Justice Stevens."[42] Justice White, writing for Justice Rehnquist, Justice Powell, and Chief Justice Burger also mentioned the impact the majority's insistence upon numerical equality would have on gerrymandering.[43]

From *Gomillion* to *Karcher*, the Court was exposed to the political gerrymandering issue. Despite language in the cases that appeared to indicate the justiciability of political gerrymandering, the Court had not spoken authoritatively on the subject. After *Karcher*, with at least two justices giving clear signals that they would consider a gerrymandering claim, the stage was set for a di-

37. *Id.* at 728.
38. *Id.* at 738-39.
39. *Id.* at 740.
40. *Id.* at 741.
41. *Id.* at 744 (Stevens, J., concurring).
42. *Id.* at 787 (Powell, J., dissenting).
43. *Id.* at 776-77 (White, J., dissenting). Despite concern with gerrymandering, Justice Rehnquist and Chief Justice Burger subsequently joined the dissent in *Davis*, 106 S. Ct. at 2816, opposing the justiciability of the issue.

rect challenge to a reapportionment plan as political gerrymandering in violation of equal protection.

II. DAVIS V. BANDEMER

Davis v. Bandemer[44] is the first case in which the Court squarely held that political gerrymandering is justiciable and that it can be violative of the fourteenth amendment's equal protection clause. After the 1980 census, the Indiana Legislature began the process of reapportioning the state's legislative districts. The governorship and the majority of both houses of the legislature were in Republican hands. The apportionment plan was conceived by the Republicans without input from Democrats, and passed both houses on a party line vote.[45] The plan provided for a mix of single-member, double-member, and triple-member districts for the House, and single-member districts for the Senate. Members of the Indiana Democratic Party[46] filed suit in early 1982, contending that the plan violated their rights as Democrats to equal protection under the fourteenth amendment.

Before the case was tried by a three-judge district court,[47] the 1982 Indiana elections were held. In the state house elections, the Democrats received 51.9% of the total statewide votes, but won only 43 seats—a discrepancy of 8.9%. The Democrats polled 53.1% of the statewide vote for senatorial candidates and won thirteen out of twenty-five senate seats up for election that year. The district court found that the plan constituted an intentional effort to favor the Republicans and disadvantage the Democrats.[48] In particular, the district court found the multimember districts used in Marion (Indianapolis) and Allen (Fort Wayne) Counties clearly showed discriminatory line drawing because Democrats received

44. 106 S. Ct. 2797 (1986).

45. The bills in both houses were vehicle bills and contained nothing of substance. The actual plan was passed and then referred to a conference committee whose voting members were exclusively Republicans. *Bandemer v. Davis*, 603 F. Supp. 1479, 1483 (S.D. Ind. 1984).

46. The Indiana NAACP also filed a suit challenging a plan as an unconstitutional dilution of the black vote in violation of the fourteenth and fifteenth amendments and the Voting Rights Act of 1965, 42 U.S.C. § 1973 (1982 & Supp. III 1985). The District Court rejected the NAACP's claims because blacks were not discriminated against as blacks, but as Democrats. *Davis*, 106 S. Ct. at 2803 n.8.

47. The three-judge panel was authorized under 28 U.S.C. § 2284(a) (1983), which provides that such a panel shall be established when a challenge is made concerning the constitutionality of the apportionment of congressional districts or of any statewide legislative body.

48. *Davis*, 603 F. Supp. 1479 (S.D. Ind. 1984).

46.6% of the vote, but won only three seats, or just 14% of the total. Partially based on the above election returns, the court also found the plan had a discriminatory effect. With evidence of discriminatory intent and impact, the divided district court held that the reapportionment plan was unconstitutional and ordered the Indiana Legislature to prepare a new plan.[49]

A. *The Decision of the Court*

The United States Supreme Court opinion can be divided into two separate sections. First, the justiciability issue, and second, the equal protection analysis. Writing for a six justice majority,[50] Justice White initially faced the issue of whether claims of political gerrymandering were justiciable. He immediately dismissed the precedential value of earlier decisions in which the Court had summarily affirmed cases which rejected gerrymandering claims as nonjusticiable. Justice White indicated that the Court now felt it appropriate to give the issue full consideration, and accordingly was not bound by those decisions.[51]

Justice White then examined gerrymandering in terms of the political question[52] analysis articulated in *Baker v. Carr*.[53] In apply-

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49. *Id.* at 1496.

50. Justice White's analysis of the justiciability of gerrymandering was endorsed by a total of six justices—Brennan, Blackmun, Marshall, Powell, and Stevens. Justice White's opinion overturning the decision of the district court constituted a plurality of four—Justices Brennan, Blackmun, and Marshall. Justice Powell, joined by Justice Stevens, would affirm the district court's finding of a violation of equal protection. Chief Justice Burger and Justices Rehnquist and O'Connor dissented from Justice White's justiciability analysis but concurred in the judgment that the district court be reversed.

51. *Davis*, 106 S. Ct. at 2804. The cases which the Court had given summary treatment were: WMCA, Inc. v. Lomenzo, 382 U.S. 4 (1965), *summarily aff'g* 238 F. Supp. 916 (S.D.N.Y. 1965); Jimenez v. Hidalgo County Water Improvement Dist. No. 2, 424 U.S. 950 (1976), *summarily aff'g* 68 F.R.D. 668 (S.D. Tex. 1975); Ferrell v. Hall, 406 U.S. 939 (1972), *summarily aff'g* 339 F. Supp. 73 (W.D. Okla. 1972); Wells v. Rockefeller, 398 U.S. 901 (1970), *summarily aff'g* 311 F. Supp. 48 (S.D.N.Y. 1970).

52. The political question doctrine is a self-imposed limitation on a court's jurisdiction that it will not decide certain questions which are better suited for other branches of government to decide. Its origin can be traced to *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (where the court refused to decide whether a treaty had been broken). The case usually associated with the origin of the doctrine is *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (where the Court refused to rule which government of Rhode Island was legitimate under the guaranty clause in light of the prior decision made by the President). *See* R. DIXON, *supra* note 7, at 101; R. CARR, THE SUPREME COURT AND JUDICIAL REVIEW 197 (1942).

53. 369 U.S. 186 (1962). The standards are:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and

ing the *Baker* standards, the Court found that political gerrymandering did not present a political question. First, the Court held that the gerrymandering question did not involve the Court in a decision more properly decided by a co-equal branch of the federal government; the decisions under review were made by the state legislature, not Congress. Second, it was evident that due to the Court's intervention, there was no risk of foreign or domestic disturbance. Third, the Court was unpersuaded that the issue was amenable to judicially discoverable and manageable standards.[54] Justice White focused closely on the last part of the political question analysis. He noted that *Baker v. Carr* held that malapportionment was justiciable before the advent of the "one person, one vote rule."[55] The fact that the solution to gerrymandering may not be as susceptible to standardization did not make gerrymandering a political question.

Furthermore, Justice White saw no reason to differentiate between claims of political gerrymandering and claims of racial gerrymandering, which the Court had adjudicated on the merits.[56] Therefore, based on the *Baker* analysis and the fact that the political question doctrine did not require the Court to avoid all questions involving politics, the Court found political gerrymandering to be justiciable.

The second part of Justice White's opinion dealt with the standards which would be applied to political gerrymandering claims. Writing for a plurality of four,[57] Justice White wrote that "the Bandemer plaintiffs were required to prove both intentional dis-

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> manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence. The doctrine of which we treat is one of "political questions," not one of "political cases."

Id. at 217.

54. 106 S. Ct. at 2805.

55. The "one person, one vote" standard for remedying malapportioned legislatures was articulated in *Reynolds v. Sims*, 377 U.S. 533, 557-61 (1964), two years after the decision in *Baker v. Carr*.

56. 106 S. Ct. at 2806. *See, e.g.*, White v. Regester, 412 U.S. 755 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971).

57. *See supra* note 50 for a discussion of the justices voting alignments.

crimination against an identifiable political group and an actual discriminatory effect on that group."[58] The plurality had little trouble in finding that the first prong of the equal protection analysis was satisfied, noting that "it should not be very difficult to prove that the likely political consequences of the reapportionment were intended."[59] Justice White pragmatically realized that when a legislature redistricts it is fully aware of the political consequences of its decision. The majority party of the legislature has information concerning the political profile of the state, voting records, and party registration on which to base their district lines. Justice White wrote: "The reality is that districting inevitably has and is intended to have substantial political consequences."[60]

While the plurality had little trouble in satisfying the discriminatory intent prong, Justice White did not accept the lower court's finding of actual discriminatory effect. The plurality rejected the district court's analysis that "Democratic voters need only show that their proportionate voting influence has been adversely affected."[61] Justice White reaffirmed earlier decisions of the Court which held that the Constitution did not require proportional representation for districts that would approximate the anticipated statewide vote of a political party.[62] The mere fact that a party's number of seats won in an election did not reflect its share of the vote statewide was not enough to show a violation of equal protection. The plurality recognized that such a result could be a function of the winner-take-all system of district elections typical in American politics.[63]

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58. 106 S. Ct. at 2808.

59. *Id.* at 2809.

60. *Id.* at 2808.

61. *Id.* at 2809 (citing *Davis*, 603 F. Supp. at 1492).

62. *Id.* (citing White v. Regester, 412 U.S. 755 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971)). *See also* Mobile v. Bolden, 446 U.S. 55, 79 (1980) ("[t]he Court has sternly set its face against the claim, however phrased, that the Constitution some how guarantees proportional representation").

63. *Davis*, 106 S. Ct. at 2809:

> If all or most of the districts are competitive—defined by the District Court in this case as districts in which the anticipated split in the party vote is within the range of 45% to 55%—even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature. This consequence, however, is inherent in the winner-take-all, district-based elections, and we cannot hold that such a reapportionment law would violate the Equal Protection Clause because the voters in the losing party do not have representation in the legislature in proportion to the statewide vote received by their party candidates.

The plurality determined that an equal protection violation has occurred "only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."[64] To support a claim of unconstitutional gerrymandering, the plurality required evidence that the reapportionment scheme showed a "continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process."[65] The plurality deliberately chose a high threshold for political gerrymandering claims in part because Justice White realized that to hold otherwise would invite an avalanche of gerrymandering claims involving federal courts in the work traditionally borne by state legislators. In summary, a plan has to have "sufficiently serious" effects before the courts should act.[66]

Applying the above principles to the facts at hand, Justice White concluded that the results of a single election were insufficient to prove unconstitutional discrimination.[67] In the only real analysis of the discriminatory effect standard, Justice White listed certain factors not found by the lower court.[68] First, there was no showing that the Democrats could not take control of the legislature in one of the next elections, nor did the district court inquire as to what percentage of the statewide vote the Democrats needed in order to take control. Secondly, there was no finding that the Democrats would be consigned to minority status throughout the 1980s with no possibility of improving their situation after the 1990 census. The above factors are important because they shed some light on what is required to make a prima facie showing of discriminatory effect.

Justice White reiterated that the claim before the Court was a statewide claim. Therefore, the fact that particular districts were constructed to be safely in the hands of one party did not constitute statewide discrimination.[69] Because of the nature of the statewide claim, the grossly disproportionate results in Marion and Allen Counties could pass constitutional muster. The Court again

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64. *Id.* at 2810.

65. *Id.* at 2811.

66. *Id.* The plurality also implied that the threshold showing for a political gerrymandering claim might be higher than that for other equal protection cases. *Id.* at n.14.

67. *Id.* at 2812.

68. *Id.*

69. *Id.* The plurality had to make this finding or overrule Gaffney v. Cummings, 412 U.S. 735 (1973), which upheld the Connecticut districting plan despite its tendency to create safe districts which afforded minorities in those districts little chance of political success.

emphasized that returns from one election do not constitute gerrymandering in violation of the equal protection clause, rather, there must be a showing of a history of disproportionate results.[70]

In addition to Justice White's plurality opinion, three additional opinions were rendered. Chief Justice Burger wrote a very short opinion concurring in the judgment. Justice O'Connor, joined by the Chief Justice and Justice Rehnquist, also filed an opinion concurring in the judgment, and Justice Powell, joined by Justice Stevens, wrote an opinion concurring in the plurality's treatment of the justiciability issue and dissenting from the judgment reversing the district court's finding of a violation of equal protection.

Chief Justice Burger believed the Court should stay away from the gerrymandering issue. He observed that the remedy to the plaintiff's claim was in the hands of the electorate, not the courts.[71]

Justice O'Connor expressed the view that claims of political gerrymandering are not justiciable because they constitute a political question. First, Justice O'Connor feared that the plurality opinion would inevitably lead to a system of rough proportional representation.[72] Second, according to Justice O'Connor, *Baker v. Carr*, *Reynolds v. Sims*, and their progeny do not lead to the conclusion that partisan gerrymandering is also a justiciable issue. Justice O'Connor distinguished *Baker v. Carr* as a case based on an individual right to have a citizen's vote weighed equally against all other citizens. The rights asserted in the present case were group rights, and political gerrymandering did not dilute an individual's vote "in the sense in which that word was used in the *Reynolds* case."[73] Third, Justice O'Connor sought to distinguish the protections afforded to racial minorities from the protections now afforded members of the two major political parties. Members of the Democratic and Republican parties, she contended, could not claim to be discrete and insular minorities warranting special protection in the political process. She noted that the two major political parties were the dominant groups in the political process and that they lacked the history of discrimination characteristic of other groups deserving of special protections from the Court. Fourth, she maintained that political gerrymandering is a "self-limiting enterprise, because an over-ambitious gerrymander can lead to disaster for the party drawing the lines. This result occurs

70. *Id.* at 2814.
71. *Id.* at 2816 (Burger, C.J., concurring in the judgment).
72. *Id.* at 2818 (O'Connor, J., concurring in the judgment).
73. *Id.* at 2820.

because in order to have an opportunity to win even more seats, the party spreads itself too thin, weakening its safe seats and placing them at risk."[74] Finally, Justice O'Connor wrote that the plurality's decision left no judicially manageable standard by which to measure gerrymandering. She feared that the Court's standard would "over time either prove unmanageable and arbitrary or else evolve towards some loose form of proportionality," a result she concluded "would be calamitous for the federal courts, for the States, and for our two-party system."[75]

Justice Powell, in an opinion joined by Justice Stevens, approved of the plurality's justiciability analysis but would affirm the district court's finding of an unconstitutional gerrymandering. He also agreed with the plurality's two-pronged equal protection analysis, requiring a showing of discriminatory intent and effect.[76] He disagreed, however, with the plurality's finding that the Democratic voters did not suffer a dilution of their statewide voting strength. Justice Powell described the plurality's analysis as a "one person, one vote" test, and believed this was insufficient to determine whether an unconstitutional gerrymandering was enacted. He interpreted the plurality decision as relying almost exclusively on the "one man, one vote" principle and attacked the plurality opinion as not protective of group rights. "[T]he essence of a claim," wrote Justice Powell, "is that members of a political party have been denied their right to 'fair and effective representation.' "[77] Justice Powell would propose that an unconstitutional gerrymandering exists when "the boundaries of the voting districts have been distorted deliberately and arbitrarily to achieve illegitimate ends."[78] In order to evaluate the claims of an unconstitutional gerrymandering, the claims must be measured by such neutral criteria as configurations of the districts, observance of political subdivision lines, the legislative procedures by which the apportionment law was adopted, and the legislative history reflecting legislative goals.[79]

Justice Powell wrote that the biggest problem with the plurality's opinion was the failure to enuciate any standards to guide leg-

74. *Id.* at 2820-21 (citing B. CAIN, THE REAPPORTIONMENT PUZZLE 154-55 (1984)).

75. *Id.* at 2822.

76. *Id.* at 2825 (Powell, J., concurring in part, dissenting in part).

77. *Id.* at 2826.

78. *Id.* at 2827 (citing Kirkpatrick v. Preisler, 394 U.S. 525, 538 (1969) (Fortas, J., concurring)).

79. *Id.* at 2823, 2827.

islators and the courts. In his view, to establish a claim of unconstitutional gerrymandering, the plaintiff would be required to offer proof of the above factors as well as evidence concerning population disparities and the vote dilution, including the use of election returns.[80] In applying the above criteria, Justice Powell determined that an unconstitutional gerrymandering had taken place in Indiana.

B. *Impact of the Decision*

The short term impact of *Davis v. Bandemer* is most likely to be felt in California. Almost immediately after the decision was announced, Frank J. Fahrenkopf, Chairman of the Republican National Committee, indicated that the Republican Party would reopen their legal challenge of Democratically drawn congressional districts in California.[81] The California case of *Badham v. Eu*[82] may present the Court with an opportunity to expound upon its ruling in *Davis v. Bandemer*. *Badham* grew out of the California congressional reapportionment plan drawn in 1982, following the 1980 census. The plan, drawn by the late Representative Phillip Burton and a Democratic political consultant, took a congressional delegation which was split 22-21 after the 1980 elections and by adroit line drawing turned it into a 28-17 Democratic majority.[83] The plan resulted in six Republican incumbents being placed in the same district as a fellow Republican, which virtually destroyed the representative's old district, causing him not to run again.[84] The Democratic majority in congressional seats existed even though their percentage of the total vote was 49% in 1984 and 52% in 1986.[85] Not only did the Democrats dominate the number of seats from California, the districts they drew were noncompetitive. For example, in the 1986 elections, every incumbent received at least 57% of the vote.[86] The California case probably will present the Court with its next encounter with political gerrymandering.

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80. *Id.* at 2832.

81. *GOP Plans to Cite Ruling in California*, N.Y. Times, July 1, 1986, at A17, col. 2.

82. 568 F. Supp. 156 (N.D. Cal. 1983).

83. 44 Cong. Q. Weekly Rep. 1641 (July 19, 1986). California gained two congressional seats from the 1980 census. 40 Cong. Q. Weekly Rep. 2787 (Nov. 6, 1982).

84. Grofman, *Criteria For Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 157 (1985).

85. 42 Cong. Q. Weekly Rep. 2943 (Nov. 17, 1984). Republicans captured an additional seat in 1984. *Id.*

86. 44 Cong. Q. Weekly Rep. 2892 (Nov. 15, 1986).

In *Badham*, the Court will have an opportunity to define the nature of the right created in *Davis v. Bandemer*. Justice White's equal protection factors would be difficult to apply to the facts of *Badham*. First, in *Badham*, the history of discriminatory impact stretches across three elections. Second, Justice White's other factors may be inapplicable because the claim is not concerned with control of the state legislature, but with the number of congressional seats.[87]

The Court may soon answer the question of whether the right created by *Davis* was merely a pronouncement that the idea of partisan political gerrymandering is wrong. An affirmative answer to this question would support the conclusion that the Court fears the "political thicket" and recognizes the dearth of any real standards to deal with the problem. Alternatively, the Court may enforce the right created in *Davis v. Bandemer* and impose the necessary guidelines and standards.

The long-range implications of the decision will probably benefit Republicans more than Democrats. The Democrats have more to lose because currently they control the legislatures in 28 states, compared with 10 controlled by Republicans.[88] Thus the Democrats have more opportunities to gerrymander. Moreover, on the federal level, an even more startling fact is that the states controlled by Democrats contain 276 congressional seats, while the Republican controlled states have only 36 seats.[89] Some political observers, believe that a major reason for the Democratic Party's dominance in the House of Representatives since 1954 has been due to skillful gerrymandering.[90] Quite possibly the greatest impact of the decision will be to exert a "chilling effect" on state legislators, deterring the more egregious examples of gerrymandering after the 1990 census.[91] *Badham v. Eu* could provide some indication

87. It will be interesting to see if the Court bases its decision on the fourteenth amendment or on article I. In the apportionment cases, state legislatures were scrutinized under the equal protection clause, while congressional apportionment was analyzed under article I, section 2. *See* Mahan v. Howell, 410 U.S. 315 (1973).

88. 44 Cong. Q. Weekly Rep. 2893 (Nov. 15, 1986).

89. *Id.*

90. *Squeezing the Gerrymander*, Wall St. J., July 3, 1986, at 16, col. 1. An interesting question is whether the Democratic majority is due to gerrymandering, to the increased advantages of incumbency, or due to a combination of the two. In 1986, for example, a record 98% of House incumbents were reelected. 44 Cong. Q. Weekly Rep. 2891 (Nov. 15, 1986).

91. *The Court Meets The Gerrymander*, N.Y. Times, July 7, 1986, at A16, col. 1; 44 Cong. Q. Weekly Rep. 1642 (July 19, 1986) (quoting Michael Hess, an attorney for the Republican National Committee).

as to what standards the Court will adopt. In the interim, because of the high threshold required by the plurality opinion, it is unclear which states' districting plans are constitutionally suspect.

III. WHY THE COURT SHOULD HEAR GERRYMANDERING CLAIMS

To begin any discussion of the justiciability of political gerrymandering it is useful to understand the nature of the wrongs associated with political gerrymandering. Some commentators have asserted that political gerrymandering undermines the basic assumptions of democracy.[92] Gerrymandering, it is contended, adversely affects the fair opportunity to elect representatives and interferes with the right of association guaranteed by the first amendment.[93] Gerrymandering is also "alleged to result in less responsive legislative bodies because the creation of safe districts insulates some members from the currents of political change and at the same time underrepresents minority parties and minority citizens."[94]

A. The Justiciability Issue

To adjudicate claims of political gerrymandering, it is argued, is to continue the *Reynolds v. Sims* command of "fair and effective representation." This command is not completely met by equality in population since in some districts the voting strength of a class of citizens can be so diluted as to limit or frustrate that group's opportunity for effective political participation.[95] The seriousness of the gerrymandering problem, it is posited, justifies the Court's intervention. There are several problems with that analysis. First, it fails to account for the American system of winner-take-all district elections.[96] The minority party, whichever it may be, always will be frustrated or disenfranchised because it does not share the political power despite the percentage of its votes. The only true way to protect the minorities interest, is by a form of proportional

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92. BAKER, *supra* note 5, at 147. The assumptions are: "representative character of legislative body; effective voter choice between candidates, and the degree in which the system reflects changes in popular sentiment." *Id.*

93. R. DIXON, *supra* note 7, at 499.

94. J. ELY, DEMOCRACY AND DISTRUST 103 (1980); *see also* Engstrom, *supra* note 4, at 175.

95. Grofman, *supra* note 84, at 112-13 (quoting Reynolds v. Simms, 377 U.S. 533, 565 (1964)).

96. Cain, *Simple vs. Complex Criteria For Partisan Gerrymandering: A Comment on Niemi and Grofman*, 33 UCLA L. REV. 213, 220-21 (1985).

representation, a step the court explicitly refuses to take.[97] Second, while gerrymandering may foster the creation of safe districts in which incumbents win election after election, it fails to consider the importance of incumbency as a prerequisite for developing seniority which may provide rewards for the particular district.[98] Third, justiciability of political gerrymandering, it is argued, is compelled by the principles enunciated in *Reynolds v. Sims*. In that case, the court dealt with more than the unconstitutionality of numerical inequality; it also dealt with discrimination against a class of voters. In the malapportionment cases, discrimination was based on numbers, whereas in the case of discrimination through gerrymandering the dominant political group's votes outweighed those of the minority.[99] Furthermore, *Baker v. Carr* and *Reynolds v. Sims*, by forcing numerical equality of districts, marked the courts' entry into the "political thicket" and changed the ground rules of the game which may, in fact, have led to increased gerrymandering.[100] However, *Baker v. Carr* and *Reynolds v. Sims* and its progeny differ in that the "one man, one vote" principle is grounded upon an individual's right for his vote to count as much as his fellow citizen's. In contrast, a gerrymandering claim is based on a group right,[101] without which the holding of *Gaffney v. Cummings*,[102] preventing the creation of safe legislative seats, would necessarily be unconstitutional as violative of individual rights.[103] The "representation by a group" concept has the effect of reducing an individual voter to the status of a chip or a pawn because some Republican voters are sacrificed in Democratic districts or vice versa.[104] Accordingly, the holding of justiciability in *Baker* and

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97. *See Davis*, 106 S. Ct. at 2809. For an argument that the Constitution compels a system of proportional representation, see Comment, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 167 (1984).

98. MAYHEW, *supra* note 9 at 265.

99. Edwards, *The Gerrymander And "One Man, One Vote,"* 46 N.Y.U. L. REV. 879, 890 (1971).

100. PRESS, *Gerrymandering: Privileged Sanctuary or Next Judicial Target?*, in REAPPORTIONMENT IN THE 1970'S 121, 143 (N. Polsby ed. 1971); *see also* R. DIXON, *supra* note 7, at 499.

101. For example, the claim in *Davis* was "that each political group in a State should have the same chance to elect representatives of its choice as any other political group." 106 S. Ct. at 2806.

102. 412 U.S. 735 (1973).

103. Lowenstein & Steinberg, *The Quest For Legislative Districting In The Public Interest: Ellusive or Illusory?*, 33 UCLA L. REV. 1, 17 (1985).

104. WELLS, REPRESENTATION AND REDISTRICTING ISSUES 77, 83 (1982).

Reynolds does not compel a similar holding in the context of political gerrymandering because it addresses a different type of right.

Proponents of the justiciability of political gerrymandering also point to cases involving racial gerrymandering claims. They maintain that there is no reason to hold one justiciable and the other not, as both types have the purpose of unfairly diminishing political representation in legislative assemblies.[105] While this contention is appealing, it fails to take into account the analysis of the racial gerrymandering cases. Blacks and other groups are afforded special protection by the Court because they are discrete and insular minorities whose access to the political system has been impeded by years of official and unofficial discrimination—something the Democratic and Republican parties can hardly claim.[106]

Advocates of the justiciability of political gerrymandering also point out that gerrymandering claims can be governed by judicially cognizable standards. Various approaches have been articulated by commentators.[107] An exhaustive list is provided by Bernard Grofman in which he sets forth twelve prima facie indicators of gerrymandering.[108] However, it is beyond the scope of this Comment to fully analyze all the proposed standards which the Court could use to determine whether an unconstitutional gerrymandering existed. Several commonly mentioned factors include: compactness, respect for political subdivisions, intent or purpose, dramatically irregular shapes, and the procedures of the legislature in enacting the plan.[109] The problem with the above standards is that they only go to prove discriminatory intent of the legislature intended to gerrymander—something which the Court has already accepted as a given.[110] The standards by and large do not determine the discriminatory *impact* on the political group—a determination which should be essential to the Court's analysis.

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105. R. DIXON, *supra* note 7, at 475.

106. Lowenstein & Steinberg, *supra* note 103, at 6 n.15. *See also* White v. Regester, 412 U.S. 755, 768-70 (1973).

107. A synopsis of various proposals is contained in Lowenstein & Steinberg, *supra* note 103, at 11.

108. Grofman, *supra* note 84, at 117-18.

109. *See, e.g.*, Niemi, *The Relationship Between Votes and Seats: The Ultimate Question In Political Gerrymandering*, 33 UCLA L. REV. 185, 193 (1985); Weinstein, *Partisan Gerrymandering: The Next Hurdle in the Political Thicket?*, 1 J.L. & POL. 357, 376 (1984); Blackstrom, Robins & Eller, *Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota*, 62 MINN. L. REV. 1121, 1138 (1978) [hereinafter *Issues In Gerrymandering*].

110. *See* Davis v. Bandemer, 106 S. Ct. 2797, 2808-09 (1986).

Other criteria are based on the number of votes received in relation to seats won, the so called seat/voter ratio.[111] This standard is even more flawed than those previously mentioned. The key question is which vote to use as a data base.[112] A pure seat/vote analysis fails to take into account the normal percentage difference due to the winner-take-all system of district elections. Furthermore, other factors such as incumbency, personality of the candidates, and local issues must be considered.[113] That the set of voters is to serve as the data base presents serious problems. Because the gerrymander right belongs to the political parties, the data base must be grounded on party voter strength. Some analysts have suggested using the votes of races for obscure offices such as state auditor and state judgeships to measure the real strength of the party.[114] The factor of party registration also fails as an indicator of discriminatory impact because it does not take into account independent voters who may frequently be aligned with a particular party or candidate.[115] Moreover, allegiance to a political party changes over time and is not reflected by this test. Thus the seat/voter ratio is based on the erroneous premise that a "vote for a party's candidate in one district would translate into votes for the same party in another district."[116]

Although under some circumstances unconstitutional gerrymandering may be identifiable, the question necessarily arises: What standards can be used to fashion a remedy? In other words, how will the court determine where the lines should be drawn?

In summary, no recognizable and easily applied test is available for gerrymandering. Thus in all probability the Court will rely upon a "totality of the circumstances" approach which will involve an examination of the impact of the plan as a whole to determine whether unconstitutional gerrymandering exists. Once the Court perceives a gerrymandering, it will only hold the plan unconstitutional if it is an example of "invidious partisan lust,"[117] or if it is so egregious as to offend the Court.[118] This standard, however, is deficient because it does not provide a guide to state legislatures when

111. For an analysis of the seats/voter relationship see generally Niemi, *supra* note 109.
112. *Id.* at 204.
113. *Issues in Gerrymandering*, *supra* note 109, at 1129-30.
114. Niemi, *supra* note 109, at 204-5.
115. *Issues in Gerrymandering*, *supra* note 109, at 1131-32.
116. *Id.* at 1128.
117. Grofman, *supra* note 84, at 124.
118. Engstrom, *supra* note 4, at 212.

they redraw their district lines every ten years. While some standards will probably be developed on a case-by-case basis, the question remains: Is it the function of our courts to oversee every apportionment plan?

The most manageable standard for the Court to impose would be some sort of proportional representation. However, not only is proportional representation not required by the Constitution,[119] it would also be dangerous to the American political system. The problems inherent in a system of proportional representation are numerous. First, it would weaken the two-party system by encouraging the creation of viable third parties, thereby contributing to political instability. Secondly, due to the failure of any party to constitute a majority, smaller parties with little support would hold the balance of power in forming coalitions. Since this would require straight party-line voting, it would take away choices from the electorate.[120] Such far-reaching changes in the structural makeup of the American political system should not be decided by the Court on an ad hoc, case-by-case basis.[121] Proportional representation, if adopted, should be the subject of serious debate and study by society as a whole, and should ultimately be enacted by state legislatures or by amendment to the Constitution. Intervention by the Court ignores the protections inherent in the political process against truly egregious examples of gerrymandering. For example, a party must control both houses of the state legislature as well as hold the governor's office in order to be successful.[122] Another institutional limitation is that the party drawing the lines may become too ambitious and spread its strength too thin in an attempt to increase the size of its majority. This can only be done by making some or all of its seats less safe.[123] Furthermore, incumbent legislators represent another limitation because of their fear of losing their core of partisan voters to help the party in another district.[124]

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119. Davis v. Bandemer, 106 S. Ct. 2797, 2809 (1986); *see also* Mobile v. Bolden, 446 U.S. 551, 75-76 (1980).

120. Levinson, *Gerrymandering And The Brooding Omnipresence Of Proportional Representation: Why Won't It Go Away?*, 33 UCLA L. REV. 257, 272-73 (1985); Weinstein, *supra* note 109, at 372.

121. Weinstein, *supra* note 109, at 372.

122. *See* MAYHEW, *supra* note 9, at 275.

123. Lowenstein & Steinberg, *supra* note 103, at 67; *see also* Scarrow, *The Impact*, in REPRESENTATION AND REDISTRICTING ISSUES 223, 231 (1982).

124. Lowenstein & Steinberg, *supra* note 103, at 68.

Based on the foregoing analysis, the Court should avoid the "thicket" of political gerrymandering. Due to the lack of clearly manageable standards, the intensely political nature of the issue, the protections inherent in the current system, and the dangers presented by proportional representation, the Court should adhere to its political question doctrine and refuse to recognize these types of cases. The major political parties should not be able to refight the election campaigns in the courthouse just because the outcome did not suit them. To hold that political parties are denied equal protection when they are afforded the same opportunities to compete for voters trivializes equal protection. If the Court in such cases as *Davis v. Bandemer* is inclined to fully enter the political "thicket," it should at least have a clear idea of what constitutes gerrymandering and what remedies it intends to offer.

B. Political Gerrymandering and Equal Protection

Equal protection jurisprudence is traditionally divided into varying levels of scrutiny of legislative enactments.[125] Generally, legislation concerned with social or economic matters is presumed to be valid, and the enactment will be sustained if it is rationally related to a legitimate state interest.[126] A different rule applies, however, if a statute classifies by race, alienage, national origin, or if it affects fundamental rights. Such legislation is subjected to strict scrutiny and will be sustained only if the legislation serves a compelling state interest.[127] A third intermediate category consists of classifications based on gender and illegitimacy.[128] These classifications will pass constitutional muster only if substantially related to a sufficiently important government interest.[129]

Claims of political gerrymandering may fit into the above rubric in two ways. First, political gerrymandering may discriminate against the Republican and Democratic Parties as a group. However, discrimination against a group does not automatically compel

125. Although its terms speak only to state legislation, the Court has made the equal protection clause applicable to the federal government through the fifth amendment's due process clause. Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975).

126. United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174-75 (1980); New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam).

127. Cleburne v. Cleburne Living Center, 471 U.S. 1002 (1985); *Dukes*, 427 U.S. 297 at 303 (1976); Kramer v. Union Free School Dist., 395 U.S. 621, 626 (1969); McLaughlin v. Fla., 379 U.S. 184, 192 (1964).

128. *Cleburne*, 105 S. Ct. at 3255; Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Craig v. Boren, 429 U.S. 190 (1976).

129. Mathews v. Lucas, 427 U.S. 495, 505 (1976).

the exacting standard of review inherent in the strict scrutiny test. Certain groups have been afforded such protections because of a history of purposeful discrimination and because they were relegated to a position of political powerlessness. This history warranted extraordinary protection from the majoritarian political process.[130] The justification for imposing strict scrutiny on classifications affecting racial groups and aliens does not exist when the complaining group is a major political party. The Democratic and Republican Parties have dominated American politics since the 1850s. They simply cannot be heard to complain that they have been effectively shut out of the political process. The rationale for strict scrutiny is not applicable because political parties can protect themselves in the political process and do not need the courts to win elections for them. Furthermore, major political parties lack the other characteristics of traditionally "suspect groups."[131] For example, membership in a political party is hardly an immutable characteristic. People can change allegiance to political parties by changing voter registration, voting for the other party in the next election, voting for the other party's candidate for another political office, or simply changing the party with whom they identify. Accordingly, political parties cannot be considered suspect groups under the traditional equal protection framework.

Although political parties do not fit into a suspect group category, political gerrymandering may be implicated by the fundamental rights analysis. The Court has recognized the right to vote as a fundamental right to which strict scrutiny applies. This right was first recognized in *Reynolds v. Sims*.[132] As noted before, however, the right recognized in *Reynolds* was an individual constitutional right,[133] not a group right. Justice White recognized this when he wrote:

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130. *Mississippi Univ. for Women*, 458 U.S. at 730.

131. Regents of Univ. of Calif. v. Bakke, 438 U.S. 265 (1978); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976).

132. 377 U.S. 533, 576 (1964).

133. Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713 (1964). The Court noted:

> An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause. . . . A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be.

Id. at 736-37.

> The issue here is of course different from that adjudicated in *Reynolds*. It does not concern districts of unequal size. Not only does everyone have the right to vote and to have his vote counted, but each elector may vote for and be represented by the same number of law makers. Rather, the claim is that each political group in a state should have the same chance to elect representatives of its choice as any other political group.[134]

The right established by *Reynolds* was the right of each individual voter to have his vote weighted equally with those of all other citizens.[135] The one man, one vote principle is not implicated, much less violated, by political gerrymandering.

Since the fundamental right to vote is an individual right, political gerrymandering claims are not included within the strict scrutiny standard. To hold that political gerrymandering involves an individual right invoking strict scrutiny would necessarily require a system of proportional representation. This result follows because every voter in every district would have a claim that his interests are not being represented because his party's candidate did not win. The result would also make every attempt at a bipartisan solution, such as was achieved in *Gaffney v. Cummings*, unconstitutional because some voters would be placed in districts without any chance of electing a representative of their own choice.

Claims of political gerrymandering also do not fit within the rubric of the quasi-suspect classifications which deal with gender and illegitimacy-based classifications.[136] Again, the justifications for imposing the higher level of scrutiny are not present when the claim is brought by one of the major political parties.

Accordingly, one is left with the conclusion that political gerrymandering should be subject to the rational relationship test. As stated by Justice Stewart in *Mobile v. Bolden*,[137] "where a state law does not impair a right or liberty protected by the Constitution, there is no occasion to depart from 'the settled mode of constitutional analysis of legislat[ion] . . . involving questions of economic and social policy.'" The rational relationship test is extremely deferential to legislative judgment, and thus gerrymandering should pass constitutional muster provided the legislature has an arguable basis for drawing the lines as it did. In the context

134. Davis v. Bandemer, 106 S. Ct. 2797, 2806 (1986).
135. *Reynolds*, 377 U.S. at 576.
136. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973).
137. 446 U.S. 55, 76 (1980) (quoting *San Antonio Indep. School Dist.*, 411 U.S. at 33).

of political gerrymandering, the legislature should be able to show that its lines are drawn rationally, even if the lines can be drawn better, because the Court will defer to the legislature.[138]

IV. CONCLUSION

The United States Supreme Court completed its entry into the "political thicket" in *Davis v. Bandemer*. The Court's decision, however, provides more questions than answers. The absence of any clear standards for identifying unconstitutional gerrymandering keeps the lower courts and state legislatures in the dark. The Court's decision in *Davis v. Bandemer* leaves the impression that the Court believes that partisan political gerrymandering is generally bad and may in some cases be unconstitutional.

The Court should stay out of the political gerrymandering question whenever possible, and when impossible, judge the apportionment plan under a rational relationship test. While political gerrymandering may offend the justices' sensibilities and sense of fair play, it is another thing altogether for the Court to use its power of judicial review to strike down state enactments without *constitutional* justification.

138. For cases illustrating the wide latitude accorded to legislatures under the rational relationship test, see, e.g., Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Railway Express Agency v. New York, 336 U.S. 106 (1949); New Orleans v. Dukes, 427 U.S. 297 (1976) (per curiam).